INTERIOR BOARD OF INDIAN APPEALS

Estate of Bertha Mae Tabbytite

57 IBIA 80 (05/29/2013)

Direct History:

45 IBIA 10, *remanded to OHA, Law Offices of Vincent Vitale v. Kempthorne*, No. 07-cv-094 RRB (D. Alaska May 6, 2008)
48 IBIA 281

Related cases:

33 IBIA 63
36 IBIA 177
54 IBIA 86, *recons. denied*, 54 IBIA 229

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

ESTATE OF BERTHA MAE TABBYTITE	)	Order Affirming Decision on Other Grounds
	)	
	)	Docket No. IBIA 11-094
	)	
	)	May 29, 2013

This appeal by Vincent Vitale, Esq. (Appellant),[1] has had a long history not only before the Board of Indian Appeals (Board) but in state and Federal courts in Alaska as Appellant sought repeatedly to collect attorney fees from Bertha Mae Tabbytite (Decedent)[2] for services he performed for her in two matters between 1976 and 1980 prior to Decedent's death. Appellant obtained a personal judgment against Decedent for his fees in 1997, and successfully sought reopening of Decedent's probate case for the purpose of submitting the judgment as a claim against her estate.[3] On April 1, 2011, Administrative Law Judge Earl J. Waits (ALJ), after balancing several criteria, determined that it would not be reasonable to approve Appellant's claim, and therefore denied the claim.

We affirm the ALJ's conclusion that Appellant's claim may not be paid, but on other grounds. We hold that the claim may not be paid because Decedent's estate has been closed at all times relevant to the receipt and consideration of the claim in probate and, pursuant to 43 C.F.R. § 4.251(g),[4] the claim is unenforceable. Thus, while Appellant's petition to

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[1] The appeal was filed by the Law Offices of Vincent Vitale. In December 2011, the Board received notice that the claim was transferred to Vincent Vitale, Esq.

[2] Decedent was a Comanche. Her Indian probate case is assigned docket no. AK-975-006 in the probate docket system maintained by the Department of the Interior (Department).

[3] Initially, Appellant's petition to reopen was denied, which was upheld by the Board on appeal. *See Estate of Bertha Mae Tabbytite*, 45 IBIA 10 (2007). Our decision was overturned in *Law Offices of Vincent Vitale v. Kempthorne*, No. 07-cv-094 RRB (D. Alaska May 6, 2008). On remand, Appellant's petition to reopen Decedent's probate was granted in the decision we are now asked to review.

[4] Appellant sought to reopen Decedent's probate case in March 2004. Therefore, we cite to the regulations in effect at that time, unless otherwise stated.

reopen the *case* may be granted, *see* 43 C.F.R. § 4.242(a), his claim is unenforceable because the *estate* is closed. Therefore, whether the claim should be allowed, pursuant to 43 C.F.R. § 4.251(b), is irrelevant.

Background

In 1997, Appellant obtained a personal judgment against Decedent in state court for legal services rendered to Decedent in the course of a legal dispute involving trust land owned by Decedent and related personal claims.[5] The state court awarded Appellant a total of $91,305.32, inclusive of fees, interest, and costs to date. *Anchorage Alaska v. Tabbytite*, No. 3AN-93-9653 Civil (*as amended*, Oct. 30, 1997) (Attach., Appellant's Reply to Opposition to Petition to Reopen, July 9, 2004 (Probate Record (PR) File #1)).[6] Decedent had refused to pay any legal fees to Appellant and refused to satisfy the judgment Appellant obtained against her. Appellant sought unsuccessfully to satisfy the judgment out of Decedent's Individual Indian Money (IIM) account, *see Vitale*, 36 IBIA 177, but did succeed in garnishing Decedent's Alaska Permanent Fund Dividend payments until Decedent's death in 2001.

In February 2002, the Hearings Division of the Office of Hearings and Appeals (OHA)[7] received notice of Decedent's death and the probate package from BIA to

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[5] As we explained in *Vitale v. Juneau Area Director*, 36 IBIA 177 (2001), a road was constructed without BIA's or Decedent's consent across Decedent's trust allotment in Alaska by a private individual who then transferred the road to the City of Glen Alps, which later became annexed by the Municipality of Anchorage. Litigation over the unauthorized road commenced in 1969, Decedent retained Appellant to represent her interests in 1976, and the matter "concluded in 1992, with [Decedent] ultimately receiving a sizeable award for condemnation of the portion of her allotment that the road crossed and for precondemnation use of the road." 36 IBIA at 177. Additional details concerning the history of this litigation are set out in *Law Offices of Vincent Vitale v. Tabbytite*, 942 P.2d 1141 (Alaska 1997), and cases cited therein.

[6] The final judgment consisted of the principal amount of $64,375, interest on the principal in the amount of $17,759.56 through Oct. 30, 1997; costs of $100; and attorney's fees in the amount of $9,070.76. The judgment also provides that "[t]he total judgment shall bear interest at the rate of 10.5% per annum." *Anchorage Alaska*, No. 3AN-93-9653 at 2.

[7] OHA is within the Office of the Secretary of the Department. *See* 43 C.F.R. § 4.1 and 4.1(a). OHA is not part of the Bureau of Indian Affairs (BIA). The Hearings Division subsequently divided into the Probate Hearings Division (PHD), the Departmental Cases Hearings Division, and the White Earth Reservation Land Settlements Act Hearings

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commence probate for Decedent's trust estate. *See* 25 C.F.R. § 15.203 (2002). Within PHD, the matter was assigned to Judge Richard Reeh,[8] who held a hearing on August 6, 2002. On August 14, 2002, Judge Reeh issued an order approving Decedent's will and ordering the distribution of her estate. That decision became final 60 days later, and the estate then was distributed. The Office of Trust Funds Management, within the Department, reported that Decedent's IIM account was closed on November 19, 2002. Notice, May 19, 2004, and Attach. (PR File #1). No claim was received from Appellant during this time, apparently because he was unaware that Decedent had died.

It is unclear when Appellant first learned of Decedent's death, but it appears that he had knowledge of her death no later than November 2003. He then submitted a "Petition to Reopen Case" in March 2004. The petition set forth the basis for the claim (personal judgment against Decedent), identified payments received in partial satisfaction of the claim, and included an incomplete copy of the personal judgment.[9] An affidavit eventually was submitted in support of the claim.

The petition to reopen was denied as untimely in a decision upheld by the Board in *Estate of Tabbytite*, 45 IBIA at 23. Appellant sought judicial review of the Board's decision. The district court reversed the Board's decision and held that Appellant's claim had, in fact, been timely presented as a petition to reopen. *Law Offices of Vitale*, No. 07-cv-094 RRB, slip op. at 12. The court observed, however, that "[t]he fact that a party has standing to file a petition for reopening does not mean that the petition will or must be granted, much less that the trust estate will be redistributed," and remanded this matter "for a hearing on the validity of [Appellant's] claim." *Id*. at 15.[10]

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Division. *See* 75 Fed. Reg. 64655, 64655-56 (Oct. 20, 2010) (citing 112 DM 13 (2005)). For convenience, we use "PHD" to refer to both the former Hearings Division and subsequently-created PHD.

[8] Initially, the estate was assigned to Judge Harvey Sweitzer, who is located in Salt Lake City. Upon learning that family members were located in Oklahoma, the probate proceedings were transferred to Judge Reeh in Oklahoma City.

[9] The personal judgment was signed on September 25, 1997, and set out the principal amount of $64,375 and costs of $100, but the spaces for accrued interest and for attorney's fees were left blank. These blanks subsequently were filled in and initialed by the state court judge on October 30, 1997. This amended judgment was submitted to Judge Reeh in July 2004 as an attachment to Appellant's reply brief in response to the opposition filed by Decedent's daughter, Maudean Tabbytite (Tabbytite).

[10] The district court remanded the matter to BIA. However, it is OHA that has the authority over and the responsibility for probating those assets held in trust by the United
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On remand, the ALJ reopened Decedent's probate, held a pre-hearing conference, and held a hearing on Appellant's claim. On April 1, 2011, the ALJ rendered his Decision on Reopening (Reopening Decision) and declined to approve the claim. In his evaluation of the claim under 43 C.F.R. § 4.251 (2001), the ALJ considered and weighed such evidence as BIA's denial of the claim when presented during Decedent's lifetime for payment against her IIM account; the delay in presentation of the claim in probate, once Appellant became aware of Decedent's death; the legal services provided by Appellant; and the accounts of Decedent as a "difficult client." Reopening Decision at 8. After considering the evidence, the ALJ concluded that "it would be unreasonable to allow the claim." *Id*.

This appeal followed. The matter has been fully briefed by Vitale and Tabbytite, including supplemental briefing requested by the Board on whether, as a threshold matter, Appellant's claim against Decedent's estate was enforceable when, at the time Appellant sought reopening, Decedent's estate was already closed. *See* 43 C.F.R. § 4.251(g), now found at 43 C.F.R. § 30.147.[11]

Discussion

Because Decedent's estate has been and has remained closed at all times relevant to the presentment and consideration of Appellant's claim, Appellant's claim is not enforceable against Decedent's estate. *See* 43 C.F.R. § 4.251(g). Therefore, whether the claim should be allowed is irrelevant, and we affirm the ALJ's conclusion that the claim cannot be paid, albeit because it is not enforceable, not because it is disallowed.

I. Standard of Review

We may affirm the decision on the grounds set forth therein or on other grounds supported by the record. *See Estate of Margerate Arline Glenn*, 50 IBIA 5, 19-21 (2009). The Board considers *de novo* any questions of law and the sufficiency of the evidence. *Estate of Cyprian Buisson*, 53 IBIA 103, 107, *recons. dism'd and denied*, 53 IBIA 176 (2011).

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States for deceased Indians, with certain exceptions not here relevant. *See* 43 C.F.R. Part 4, Subpart D.

[11] Appellant moves to strike Tabbytite's supplemental reply memorandum, arguing that the Board's Order for Supplemental Briefing called for one, simultaneously filed brief and did not allow for reply briefs. Appellant is mistaken. The Board's Order expressly permitted optional supplemental reply briefs within 10 days of receipt of an opposing party's supplemental brief. *See* Order for Supplemental Briefing, Mar. 29, 2013. Therefore, Appellant's motion is denied.

II. Appellant's Claim is Not Enforceable Against Decedent's Trust Estate

At the outset, we agree with Appellant that the ALJ's consideration of his claim was insufficiently explained. The ALJ did not explain how he weighed the criteria that he considered, i.e., whether he gave greater weight to the facts of one criterion over other criteria, nor did he explain why he believed the facts justified denying Appellant's claim *in toto* as opposed to denying it in part. Therefore, we cannot sustain the ALJ's analysis in support of his decision to disallow payment of Appellant's claim. But for the reasons we set forth below, we determine as a matter of law that regardless of whether Appellant's claim is allowed, it is not enforceable against Decedent's estate.

In its entirety, 43 C.F.R. § 4.251(g) states: "The unpaid balance of *any* claims will not be enforceable against the estate after the *estate* is closed." Emphasis added. "Estate" means "the trust cash assets and restricted or trust property *owned by the decedent* at the time of his or her death." *Id.* § 4.201 (definition of "estate") (emphasis added); *see also* 25 C.F.R. § 15.2 (definition of "estate") (same). Although nothing in the regulations specifically addresses that point in time when the trust estate of a deceased Indian is "closed," we conclude that the *estate* is closed when the decedent's assets have been distributed, e.g., through the payment of claims and the distribution of the remainder to heirs or devisees. Whether an *estate* is open or whether it is closed within the meaning of § 4.251(g) is a separate inquiry from whether a probate *case* is open or closed and whether a closed probate *case* may be reopened within the meaning of § 4.242(a).

To accommodate the appeals process for Indian probate, a probate decision must be final *before* any distribution of a decedent's estate may occur, i.e., the probate case must close before the decedent's estate can be closed. *See* 25 C.F.R. § 15.312; 43 C.F.R. § 4.273. The estate will remain intact for at least 75 days following the date of mailing the initial probate decision to the interested parties. If no appeal (e.g., a petition for rehearing) is filed, steps are *then* taken to change title records for trust and restricted real property, pay allowed claims, and distribute funds in the IIM account. 25 C.F.R. § 15.312.[12] If an appeal is filed, no action may be taken to distribute the decedent's trust property until the appeal is resolved, unless a partial distribution is authorized. *Id.*[13] Thus, the probate case

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[12] We focus our discussion on the IIM account inasmuch as trust or restricted lands are not available for the payment of claims. *See* 43 C.F.R. § 4.252 (claims against an Indian's trust estate may be paid from income from lands remaining in trust along with "all trust moneys of the deceased on hand or accrued at time of death, including bonds, unpaid judgments, and accounts receivable.").

[13] Some disputes in a probate proceeding may raise challenges that implicate the distribution of all of the assets in the estate, e.g., a will contest, for which reason the estate

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closes before the estate closes. The regulations do not identify any additional steps to be taken following the distribution of the estate assets to the heirs or devisees. Therefore, taking the regulations as a whole, we conclude that an Indian decedent's trust estate is closed within the meaning of 43 C.F.R. § 4.251(g) when the trust assets have been distributed from the estate and nothing remains in the trust estate.

Our conclusion is supported by the history of § 4.251(g). This section first was adopted over 65 years ago and, as originally promulgated, provided in relevant part: "If the income of the estate is not sufficient to permit the payment of allowed claims of general creditors within three (3) years from the date of allowance, the unpaid balance of such claims shall not be enforceable against the estate or any of its assets." 12 Fed. Reg. 3762, 3765 (June 10, 1947), codified at 25 C.F.R. § 81.25(b) (1947). This provision remained intact until 1971, when the time was extended from 3 years to 7 years for the payment of certain "preferred" claims; allowed claims of "general creditors" remained unenforceable after 3 years from the date of allowance. 36 Fed. Reg. 7185, 7198 (Apr. 15, 1971), codified at 43 C.F.R. § 4.251(d) (1972).[14] In 2001, the regulations again changed, and the current provision, codified at § 4.251(g), was promulgated. Thus, for over 65 years, Indian trust estates remained open for several years to permit the payment of approved or "allowed" claims from income accruing to Indian decedents' estates.

As explained in the comments on the 2001 amendment to § 4.251, "the provision allowing *estates* to remain *open* for up to 7 years for the payment of claims" was deleted in favor of consistency with new BIA regulations codified at 25 C.F.R. §§ 15.305-15.309. *See* 66 Fed. Reg. 67652, 67654 (Dec. 31, 2001) (emphases added). In particular, the comments observed that new § 4.251(g) permits "funds deposited in the [decedent's] IIM account after the date of death [to be] available to pay claims, *up until the time the estate is closed*." *Id.* (emphasis added). This point is reiterated in the next paragraph of comments: "[C]onsistent with 25 CFR

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will remain intact throughout the probate process. *See, e.g., Estate of Clayton Donald Mountain Pocket*, 54 IBIA 236 (2012), *appeal dism'd*, *Costa v. United States*, No. CV-12-33-BLG-RFC-CSO (D. Mont. Oct. 5, 2012). Other disputes, however, may only implicate certain assets in the estate, e.g., the disallowance of a claim against the estate. In the latter circumstances, only the specific property at issue in the case need be held in the estate pending resolution of the dispute while any remaining estate assets may be distributed if authorized by the probate judge or the Board. *See, e.g., Estate of Roy Phillip Watlamatt*, 46 IBIA 60, 63 n.6 (2007).

[14] Also at this time, the responsibility for probating the trust assets of deceased Indians transferred to the newly established OHA, and the regulations governing Indian probate transferred from 25 C.F.R. Part 15 to 43 C.F.R. Part 4, Subpart D.

15.308,[15] funds deposited in the IIM account *during the probate process itself* are available to pay claims." *Id*. (emphasis added). Also of significance is a comment explaining the adoption of § 15.308:

> The majority of the commenters . . . objected to holding estates open for the payment of any claims, regardless of [whether they are] priority or general claims. Commenters stated that the United States, as trustee, has placed the creditors of Indian individuals in a better position than creditors of other non-Indian citizens by holding the estates open to pay creditor claims.

66 Fed. Reg. 7068, 7074 (Jan. 22, 2001).[16]

Thus, the history of § 4.251(g) reveals that where claims were allowed against a decedent's trust estate but funds were insufficient to pay the claims, the estate remained open for up to 7 years from the date a claim was approved or "allowed" to permit the claims to be paid from any trust income accruing to the decedent's estate during that time. But, in response to concerns expressed in comments on the proposed amendment of § 15.308—that holding trust estates open to pay creditor claims placed the creditors of Indian decedents in a better position than the creditors of non-Indian decedents—the Department promulgated the current regulation, which holds claims to be unenforceable once the trust estate has closed.

And that is the rule we must apply here. It is undisputed that Decedent's trust estate was distributed to her devisees in accordance with her will in November 2002 and that nothing thereafter remained in or was added to Decedent's estate that could be used to pay claims. Therefore, we conclude that Decedent's estate closed in November 2002. Because § 4.251(g) applies to "any" claim, we further conclude that it applies not only to claims that remain unpaid as of the date an estate closes but also applies to claims that are first presented after an estate has closed and regardless of whether there were funds available to

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[15] Section 15.308 is entitled, "Will the BIA use future income to pay claims?" and provides in response, "No. The unpaid balance of any claims will not be enforceable against the estate after the estate is closed." With the promulgation of 43 C.F.R. § 4.251 in 2001, § 15.308 subsequently was deleted in 2005 when Part 15 was next revised. *See* 70 Fed. Reg. 11804, 11804-85 (Mar. 9, 2005).

[16] The commenters were reacting to the proposed change to § 15.308, which would have permitted estates to remain open for 5 years. This proposed amendment was abandoned in favor of paying claims only up to the time the estate is closed. *See* note 15, *supra*.

pay part or all of a claim prior to the time the estate closed. Appellant filed his petition to reopen the probate case in March 2004, nearly 18 months after Decedent's estate had closed. Thus, we hold that, as a matter of Indian probate law pursuant to 43 C.F.R. § 4.251(g), Appellant's claim is not enforceable because at all times relevant to his petition to reopen the probate case, Decedent's IIM account already had been distributed and her estate was closed.

We turn now to address Appellant's arguments against the application of § 4.251(g). First, and citing 65 Comp. Gen. 533 (1986), Appellant argues that the Comptroller General has spoken to the issue of whether assets may be redistributed upon determining that they were distributed to a "wrongful" recipient. In the case before the Comptroller General, a decedent's assets were distributed incorrectly to the heirs, with certain heirs receiving more than they should have while others were underpaid. The error was corrected, but the question arose concerning the recoupment of those funds that were overpaid to two of the decedent's heirs. The Comptroller General held that so long as funds remained in the IIM accounts of the "wrongful" recipients, i.e., in accounts held by the United States for the recipients, the Department could permissibly retrieve the funds after giving due notice and an opportunity to object; if the wrongful funds had been removed from the recipients' IIM accounts by the Indian accountholder, the Department could not place a hold on the account and seize subsequent deposits to recoup the amount overpaid to the accountholder. This opinion is inapplicable to the facts before us for two reasons: (1) The Comptroller General's opinion did not concern a claim against the estate, much less a claim that was received in probate *after* the estate had closed, and (2) the opinion did not construe § 4.251(g), particularly § 4.251(g)'s characterization of claims as unenforceable once the estate has closed.[17]

In addition, Appellant argues that the Board has authority to and has reopened "estates" to redistribute assets after an estate has closed. These cases do not aid Appellant because they do not concern *claims* against the estate. Each one involved an appeal in which the issue was whether to add or delete an heir, not whether to allow a claim.[18] In *Estes*, the

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[17] In fact, the Comptroller General's decision issued prior to the promulgation of § 4.251(g). Appellant also cites to *Miller v. Anadarko Area Director*, 26 IBIA 97 (1994), as authority for the Board and BIA to pay claims from IIM accounts. The issue is not whether claims may be paid from IIM accounts. They can. The issue is whether claims may be paid under the facts of and the law applicable to a given case. *Miller* is irrelevant because its claim did not arise in probate, was not controlled by § 4.251(g), and did not involve the IIM account of a third party.

[18] *See Estate of Doris Mae Wilkie Klatt*, 53 IBIA 223 (2011) (concerning the petition of a person seeking acknowledgment as an heir of the decedent); *Estate of Earl Sanford Howe, Jr.*,

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appellant had inadvertently been omitted as an heir to both her father's and her paternal grandfather's trust estates and their estates had been distributed to other heirs. Notably in *Estes*, we specifically referred to BIA the issue of whether it had the authority to redistribute trust funds to the appellant after the funds had already been disbursed to other heirs and the decedents' estates were closed. *Estes*, 50 IBIA at 117 ("We leave it to BIA in the first instance to determine the appropriate mechanism, *if any*, for paying these funds to Appellant."). Nothing in our probate regulations prohibits the redistribution of trust assets upon the discovery of an omitted heir, and as Appellant points out, the Comptroller General specifically permits the redistribution of trust assets to correct errors in the distribution of a decedent's estate among and between the decedent's heirs where the assets remain in trust. *See* 65 Comp. Gen. at 538. But Appellant has not cited, nor have we found, any cases where a *claim* against a decedent's estate has been paid after the estate closed. And, regardless of whether Appellant's claim is or is not reasonable in whole or in part, § 4.251(g) specifically precludes us from enforcing an otherwise valid claim after the estate has closed and we lack authority to override a duly promulgated regulation.[19]

Next, Appellant repeatedly refers in his supplemental brief to the "estate" as being "reopened." *See, e.g.,* Appellant's Supp. Br. at 1, 4, 6, 7 n.13, 9. Nothing in the regulations

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53 IBIA 3 (2011) (appeal dismissed because appellants' claim—that one son and heir was not decedent's biological son—properly should be raised in a petition to reopen the probate case, not raised for the first time on appeal to the Board from an order dismissing a petition for rehearing to assert a claim against the estate that did not disturb the findings as to the decedent's children; that claim had been denied because it was untimely presented and because "there were no assets available for payment"); *Estate of Alice W. Holyan*, 49 IBIA 253 (2009) (appeal dismissed as premature because appellant appealed from an order to show cause why appellant and his sister should not share in the distribution of funds in decedent's IIM account); *Estate of David Martin Champagne*, 49 IBIA 209 (2009) (same as *Estate of Howe*, except no claim issue); *Estes v. Acting Great Plains Regional Director*, 50 IBIA 110 (2009) (concerning the inheritance rights of an omitted heir).

[19] Appellant argues that the ALJ stated that he had jurisdiction to redistribute Decedent's trust assets when he asserted that "any funds" in an IIM account "*may* be subject to return to the estate of Decedent . . . [*if*] I determine [it] to be legal, equitable and proper, based upon the law and the facts of the case." Appellant's Supp. Br. at 3 (quoting Reopening Order at 4) (emphasis added). As the ALJ clearly suggests, such a determination would be dependent upon the factual and legal circumstances of a given case. Here, we conclude that the law does not permit us to do so under the facts of *this* case.

speaks to reopening a closed *estate*, only to reopening a closed probate *case*.[20] Under § 4.242(a), one may petition to reopen "the case"; under § 4.251(g), claims may not be enforced against the estate after "the estate" has closed. In the context of Indian probate, "estate" is not synonymous with "probate" or "probate case," but has a specific meaning: the assets, including land and personalty, held in trust by the United States. *See* 43 C.F.R. § 4.201 (definition of "estate"); 25 C.F.R. § 15.2 (definition of "estate"). The *estate* is the *res* that is the subject of the probate *case*. And, it is entirely possible to reopen a probate case in which the estate has not yet closed. For example, the time may not yet have passed for BIA to distribute the trust assets to the heirs or devisees, *see* 25 C.F.R. § 15.312 (BIA must wait 75 days after a final probate decision before it may distribute a decedent's estate to creditors, heirs, or devisees to allow for the filing of appeals), or BIA may not yet have caused the transfer of the trust assets from the estate of the decedent to the decedent's heirs or devisees, such that the estate has not yet closed. More particularly, if one of Decedent's devisees had appealed the initial probate decision approving Decedent's will, the distribution of Decedent's estate would have been stayed during the pendency of any appeal, *see* 25 C.F.R. § 15.404, and it is quite possible that such an appeal might still have been ongoing at the time Appellant filed his petition to reopen to assert his claim against the estate. In such an event, Decedent's estate would have been available for payment of Appellant's claim, and § 4.251(g) would have been inapplicable.

Appellant also argues that once the probate case is reopened, the judge may modify, vacate, or adhere to his original decision, and thereby correct an error of law or fact. That is a correct statement. *See* 43 C.F.R. § 4.242(c). But, again, whether the *case* may be reopened and whether the *estate* may be reopened (and reconstituted) are two separate issues. Here, § 4.251(g) renders claims *unenforceable* against the trust estate once the estate has closed.[21] And contrary to Appellant's argument, an order on reopening that might allow or approve Appellant's claim does not mean it will be paid or that it will be

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[20] A probate case is considered "closed" when a decision has become final. A decision becomes final when the time for administrative appeals has lapsed. *See* 43 C.F.R. §§ 4.240(b), 4.241(f)-(g), 4.337(a). Ordinarily, i.e., in a non-claims context, the distinction between the "case" and the "estate" being "open" or "closed" may not matter, and thus the terms are sometimes used interchangeably. Here, as we have shown, the distinction bears legal significance.

[21] Appellant makes the curious argument that a claim that is "not enforceable against the estate" does not mean that the claim cannot be paid. *See* Appellant's Supp. Br. at 8. Appellant does not offer an alternate explanation of what § 4.251(g) could mean other than to suggest that estate is synonymous with the "case," which we reject. It is clear from the history of the regulation, *see supra* at 84-85, that "unenforceable" within the meaning of § 4.251(g) means that the claim cannot be paid once the estate has closed.

enforceable against the estate: § 4.251(g) operates to bar the claim from relating back to the time of the original probate order. To conclude otherwise would turn § 4.251(g) on its head and render it a nullity.[22] That is, § 4.251(g) would be stripped of any meaning. Instead (and consistent with a right to reopen the case), funds can and do remain in an estate after the probate case has closed, *see supra* at 88, and, consequently, it is not necessarily fruitless for a claimant to seek reopening. But, clearly, once the probate case has closed, any delay in submitting a claim thereafter incurs the risk that the estate will have closed as well.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms, on other grounds, the ALJ's April 1, 2011, decision that Appellant's claim is not entitled to payment from Decedent's estate. Appellant's motion for an oral hearing is denied as we determine that it would not be of assistance. This decision shall dissolve the stay imposed on Tabbytite's IIM account.[23]

I concur:

// original signed	//original signed
Debora G. Luther	Steven K. Linscheid
Administrative Judge	Chief Administrative Judge

[22] Appellant also argues that the probate judge and this Board have "continuing jurisdiction" over Decedent's trust funds by analogy to the authority reposed in the Federal courts. Appellant's Supp. Br. at 2 n.2. The Department and its judges are not Article III judges and its Boards are not Article III courts with the powers traditionally vested in said courts and judges. Our jurisdiction and authority are limited and prescribed by regulation. Nothing in the law grants us "continuing jurisdiction" over Decedent's trust funds for purposes of paying any claims once the funds have left her estate. Section 4.251(g) speaks to the contrary, and we are bound by § 4.251(g). Again, a contrary ruling would nullify § 4.251(g).

[23] Appellant argues that because Tabbytite "did not appeal the . . . § 4.251(g) . . . issue," it is waived. Appellant errs. At no time was this issue decided and, therefore, the issue was not waived by Tabbytite. Appellant's Supp. Br. at 1 n.1. She prevailed before the probate judge and, given the absence of authority in the Board's regulations for cross-appeals, she was not required to appeal the absence of a decision on this issue. *See Estate of Theresa Underwood Dick*, 50 IBIA 279, 304 (2009).